IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO.62 OF 1999

The State of Maharashtra
(V.P.Road Police Station)
in C.R.No.257/96 .. Appellant

v/s.

1. Jyotikumar Shubhanarayan Pande
(Discharged),
Age 22 yrs. R/o.MOta Mandir
Goshala, Panjarpol, Bhuleshwar,
Mumbai.
Village Address: At & Post
Narayanpur, Tal. Tanrayya,
Dist. Chapra (Uttar Pradesh)

2. Mohd. Ali @ Manmu Mohd. Shaft Shaikh
R/o. Chitta Camp, F.Centre,
H/2 Room No.1/2, Trombe,
Mumbai-88. No village address.

3. Jamil Mohiddin Shaikh,
Occ.Old Wooden Trade,
R/o.Lalji Dungars Chawl No.23,
Room No.11, First Floor,
Kamathipura, 5th Gulli,
Nagpada, Mumbai-8.

4. Abdul Matin Abdul Rajak Shaikh
age 23 yrs., Occ. Service,
R/o.C Sector H/F Line Room No.8,
Chitta Camp Trombe, Mumbai-8.
Village Address- At & Post
Bejapur, Tal. & Dist.Solapur,
Maharashtra.

5. Anwar Hussain @ Inni Abdul ..Respondents
Latif Shaikh, age 25 yrs. (Orig.Accused)
Occ. Embroadary Work,
Chitta Camp, Mumbai-88.
Village address No.
Dismissed as per court's
order dt.27.3.2000.

Smt. V.R.Bhonsale, Additional Public Prosecutor for
State.

Mr.Akhilesh Singh for original accused No.3.

Orignal accused Nos.2 and 4 are absent though served.

CORAM : R.M. LODHA AND
R.S. MOHITE, JJ.

DATED : 2nd February, 2005

ORAL JUDGMENT (Per R.M.Lodha, J.)

Originally five persons viz. Jyotikumar Shubhanarayan Pande, Mohd. Ali @ Mamu MOhd. Shafi Shaikh, Jamil Mohiddin Shaikh, Abdul Matin Abdul Rajak Shaikh and Anwar Hussain @ Inni Abdul Latif Shaikh were arraigned as accused persons in the chargesheet submitted to the Court by the investigating officer for the offence punishable under sections 394, 397 read with section 34 IPC. These accused persons were committed to the Court of Sessions, Greater Bombay for trial. Jyotikumar Shubhanarayan Pande was discharged by the court. The other four accused persons viz., Mohd. Ali @ Mamu Mohd. Shafi Shaikh, Jamil Mohiddin Shaikh, Abdul Matin Abdul Rajak Shaikh and Anwar Hussain @ Inni Abdul Latif Shaikh were put to trial for the charges aforesaid. For the sake of convenience we shall refer these four accused persons as A1, A2, A3 and A4 respectively. In support of its case, the prosecution examined nine witnesses viz. Jayesh Chandulal Shah (PW1), Kirti Ramchandra Purandare

(PW2), Kanakraj Pirchand Jain (PW3), Pradeep Babulal Sanghavi (PW4), Dr.Shailesh Bhogilal Jhaveri (PW5), Iqbal Rehman Pathan (PW6), Dhawalchand Pirajee Jain (PW7), Tanaji Arjun Jadhav (PW8) and Mr.Vikram Zaga Marathe (PW9). The prosecution evidence was put to the accused persons A1 to A4 and their statement under section 313 of the Criminal Procedure Code was recorded. Their defence was that of total denial though they examined one witness Ansari H. Rehman (DW1). After hearing the Special Public Prosecutor for the State and the counsel for the accused persons, on conclusion of the trial, the learned Additional Sessions Judge vide his judgment dated 15th October, 1998, acquitted all the four accused persons. Upset thereby, the State has approached this court by means of this criminal appeal.

2. Whether the judgment of acquittal passed by the learned Additional Sessions Judge requires interference in this appeal is a matter of consideration before us?

3. Jayesh Chandulal Shah (PW1) lodged the first information report at V.P. Road Police Station on 24.6.96 at 21.30 hours. According to the first information report, on 24.6.96 in the evening, PW1 collected a sum of Rs.3,00,000/- which he had kept

with Kanakraj Shah (PW3) a couple of days earlier; kept the same in his Echolac Chocolate colour brief-case and left for his house with the said bag. At about 20.30 hours when he was passing by the garden in First Panjarpol Lane, two persons came from his left and right hand side. The person who came from left side was armed with chopper and assaulted him. At the same time, the person who came from right hand side, snatched the brief-case from him. The person who was armed with chopper then gave two assaults on his left hand one chopper resulting in injuries and bleeding in the left hand. The said two persons ran away in the direction of C.P. Tank. PW1 got himself admitted in Harkisandas Hospital for treatment. His bag contained a sum of Rs.3,00,000/- comprising of 2000 currency notes of denomination of Rs.100/- and 2000 currency notes denomination of Rs.50/-. In the first information report, PW1 gave description of both the persons.

4. The investigation commenced. Tanaji Arjun Jadhav (PW8)-investigating officer immediately proceeded to the place and drew the spot panchanama. Further investigation was handed over to Vikram Zaga Marathe (PW9) in the intervening night between 24th June, 1996 and 25th June, 1996 at about 03.00 hours. PW9 arrested Jyotikumar Pande and at his instance A1

was arrested from his residence at Trombay. On the basis of the interrogation of Jyotikumar Pande and A1, A2 came to be arrested from his residence at Bharat Nagar, Bandra (East) on 25.6.96. On the disclosure statement made by A2, the cash amount of Rs.2,35,000/- and the chopper was recovered. The recovery of one chopper was made on the disclosure statement of A1. Two test identification parades were held by PW2 on 5.7.96. Further statement of PW1 was recorded by PW9. He identified his bag containing cash and chopper at the Police Station. PW1 was sent for medical examination and PW5 examined him.

5. The trial court considered the prosecution evidence and held that the evidence creates sufficient doubt about the involvement of A1 to A4 in the crime and consequently, acquitted all of them.

6. Acquittal of A1 and A4 was not challenged by the learned Additional Public Prosecutor before us. In our opinion rightly so since we find that in the test identification parade (second in point of time) held on 5.7.96 by PW2, PW1 was not able to identify the accused persons A1 and A4. In the entire evidence on record, we do not find any incriminating

material establishing the complicity of the accused persons A1 and A4 with the crime. Incidentally we may notice that appeal against A4 stands dismissed vide order dated 27.03.2000 for want of service. Their acquittal, therefore, does not call for any interference.

7. As regards A2 and A3, we find that there is material inconsistency in the deposition of PW1 and PW2 concerning the test identification parade (first in point of time). From the memorandum of test identification parade (first in point of time) held on 5.7.96 by PW2, it transpires that the said identification parade commenced at 16.15 hours and concluded at 16.50 hours on that day. PW2 who conducted the test identification parade has also deposed to that effect. He testified that he held the test identification parade at about 4.15 p.m. and it was over by 4.50 p.m. He has proved the memorandum of that test identification parade. PW1 on the other hand in his cross-examination stated that on 5.7.96, he had gone to the court at about 12 O'Clock noon and he was in the court upto 4.30 p.m. but from the court he went to the Police Station at about 4.45 p.m. If what PW1 says is right then he was in the court on 5.7.96 upto 4.30 p.m. and from their he went to the Police Station at about 4.45

p.m. Obviously then he was not present at the time the test identification parade was conducted by PW2 on 5.7.96 which commenced at 4.15 p.m. and concluded at 4.50 p.m. The identification of A2 and A3 by PW1, thus, becomes seriously doubtful. The trial Judge, thus, cannot be said to have erred in not disbelieving the prosecution evidence relating to the test identification parade wherein A2 and A3 are said to have been identified by PW1. Besides that, we find that the deposition of PW1 suffers from vital omissions that are in the nature of contradictions putting big question mark on the credibility of this witness in so far as identification of accused persons A2 and A3 by him is concerned. Though in his deposition before the court, PW1 stated that there was light at the place of the incident and he was able to see the accused persons, in the first information report, no such information was given. According to PW1, A1 inflicted injury on him by chopper. The recovery of chopper allegedly made at instance however did not have any blood stains. Considered thus, we find that the prosecution evidence does not establish beyond doubt that A2 and A3 committed the crime. That PW1 was victim of robbery and dacoity on 24.4.96 cannot be disputed but the question is whether complicity of the accused persons A2 and A3

with the crime is established beyond reasonable doubt. We find that the prosecution evidence is not fool proof connecting the accused persons A2 and A3 with the incident. The benefit of doubt given by the trial court to the accused persons, thus, cannot be faulted.

8. The learned trial Judge has considered the evidence at quite some length and we find ourselves in agreement with the view taken by him. The findings of the learned trial Judge do not suffer from any perversity.

9. Before we close, we may notice the submission of the learned counsel for A2 that A2-Jamil Mohiddin Shaikh is dead. The learned APP was not able to say anything for want of the death certificate. Since we have not found any merit in the appeal, this submission is not of much significance.

10. In the result, the appeal fails and is dismissed. The bail bonds of A1-Mohd. Ali @ Mamu Mohd. Shafi Shaikh (original accused No.2) and A2-Jamil Mohiddin Shaikh (original accused No.3) are discharged. We find from the office note dated 3rd September, 2004/4th September, 2004 that A3- Abdul Matin Abdul Rajak Shaikh (original accused No.4) is

in jail. He is ordered to be released forthwith if not required in any other case.

(R.M. LODHA, J.)

(R.S. MOHITE, J.)